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IN THE

Supreme Court of the United States

October Term, 1931.

No. 617.

W. YALE SMILEY,

Petitioner,

vs.

MIKE HOLM, AS SECRETARY OF STATE OF THE STATE OF MINNESOTA, ST. PAUL, MINNESOTA,

Respondent.

BRIEF OF RESPONDENT.

HENRY N. BENSON,
Attorney General of Minnesota,

WILLIAM H. GURNEE,
Asst. Attorney General of Minnesota,
Counsel for Respondent,
St. Paul, Minnesota.

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BRIEF OF RESPONDENT.

DECISION TO BE REVIEWED.

This proceeding brings up for review a judgment of the Supreme Court of Minnesota, to-wit, State ex rel. Smiley vs. Holm, 184 Minn. 647, 238 N. W. 792. The reasoning of the court below is stated in the decision of the same court on appeal from an order sustaining a demurrer to the petition, to-wit, State ex rel. Smiley v. Holm, 184 Minn. 228, 238 N. W. 494.

THE FACTS.

Following the taking of the 1930 census, and by virtue of 46 Stat. L., c. 28, adopted June 18, 1929, the State of Minnesota became entitled to nine representatives in the Congress of the United States (Record, p. 3). It had previously had ten such representatives (p. 2). The two houses of the legislature of the state, by a majority vote adopted house file 1456 (pp. 4-6), dividing the state into nine congressional districts. After such adoption the bill was presented to the governor, who returned it to the house of representatives, where it originated, with the reasons for his refusing to approve it (pp. 6 and 7). On the day following its return to the house of representatives, that body adopted a resolution directing that the enrolled copy of the bill be deposited with the secretary of state and remain a part of the permanent records in that office (p. 7). House File 1456 was deposited as directed and now reposes in the office of the secretary of state and was printed with the laws adopted at the 1931 session of the legislature at page 640.

Conceiving that his rights as a citizen, elector and taxpayer, residing in the fourth ward of the City of Minneapolis, Hennepin County, Minnesota, had been infringed upon, petitioner brought an action in the district court of Ramsey county against the secretary of state, praying that the court "declare invalid any and all filings for the nomination to the office of representative in congress in the State of Minnesota designating a subdivision of the said state as a congressional district; enjoin said secretary of state from receiving any filings for the office of representative in congress in the State of Minnesota which designate a subdivision of said state as a congressional district; and enjoin said secretary of state from giving any notice of the holding of elections for the office of representative

in congress in the State of Minnesota designating a subdivision of said state as a congressional district, and for such other, further and different relief as to the court may seem just and proper" (p. 12).

A general demurrer to the petition was sustained by the trial judge (p. 13). Petitioner appealed from this order to the state supreme court (p. 14). The order of the district court was affirmed (pp. 44-63): State ex rel. Smiley v. Holm, 184 Minn. 228, 238 N. W. 494. Upon remand to the district court, judgment was entered dismissing petitioner's action upon the merits (pp. 14-15). Timely appeal from this judgment was taken (p. 15) and the judgment was affirmed by the supreme court of Minnesota, its court of last resort, and judgment of affirmance entered in that court on November 17, 1931 (p. 16); State ex rel. Smiley v. Holm, 184 Minn. 647, 238 N. W. 792.

ARGUMENT.

POINTS.

I.

House File 1456 is valid notwithstanding its veto by the Governor.

II.

The Act of Congress of August 8, 1911 (37 Stat. L. 13, Ch. 5), is no longer in effect.

III.

House File 1456 does not violate the Act of August 8, 1911 (37 Stat. L. 13, Ch. 5).

IV.

There is no Violation of the Fourteenth Amendment.

HISTORY OF CONGRESSIONAL REAPPORTIONMENT.

As bearing upon the issues involved in this case, it may help to consider briefly the various apportionment acts passed by the Congress.

Art. I, sec. 2, of the Constitution of the United States, provides for the enumeration of all persons within the United States to be made within three years after the first meeting of the Congress, and within every subsequent term of ten years, in such manner as the Congress shall by law direct.

Section 2 of the Fourteenth Amendment provides in part that:

> "Representatives shall be apportioned among the several states according to their respective numbers, counting

the whole number of persons in each state, excluding Indians not taxed."

Article I, section 4, of the federal constitution, in the first paragraph thereof provides:

> "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

In article I, section 2, the number of representatives in Congress to which each state then forming a part of the union should be entitled is specified.

For a history of apportionment legislation and an able discussion of the power of congress to delegate authority to the legislatures of the states to redistrict for congressional purposes, the attention of the court is directed to a brief prepared by Hon. Marion E. Rhodes, representative in congress from Missouri, found in the congressional record, vol. 71, part 3, beginning at page 2447.

Following the decennial census of 1790, taken pursuant to the constitutional mandate contained in article I, section 2, of the constitution, congress passed its first apportionment act—1 Statutes at Large 253, effective April 14, 1792. The act provides for one representative from each state for every 33,000 persons. There is no reference to congressional districts, and presumably the members of congress were elected at large.

Following the census of 1800, congress passed a second apportionment act in substantially the same language as the act of 1792, and providing for one representative for each 33,000 persons (2 Stat. L. 128).

After the census of 1810, the third apportionment act was passed. The only difference between this act and the two preceding it was that the ratio was changed to one member of congress for every 35,000 persons (2 Stat. L. 669).

Following the 1820 census, the fourth apportionment act was enacted substantially the same as those preceding, except that the basis of representation was fixed at one representative for every 40,000 persons. No reference was made to congressional districts (3 Stat. L. 651).

After the census of 1830 the fifth apportionment act was passed increasing the basis of representation to one member for every 47,700 persons, there still being no reference therein to congressional districts (4 Stat. L. 516).

Following the 1840 census, by act of congress effective June 25, 1842 (5 Stat. L. 491), the sixth apportionment act became a law, fixing the ratio at one representative for every 70,680 persons in each state having a fraction greater than one moiety of the said ratio. Section 2 of the law provides that:

> "In every case where a state is entitled to more than one representative, the number to which each state shall be entitled under this apportionment shall be elected by districts composed of contiguous territory equal in number to the number of representatives to which such state may be entitled, no one district electing more than one representative."

This is the first time that congress required representatives in the house of representatives to be elected by congressional districts. Apparently, members of congress had previously been elected at large, or elected by districts determined by the several state legislatures independently of congressional action.

It may not be out of place to digress briefly at this point and show what attitude was taken by congress in respect to

its own enactment requiring representatives to be elected by districts.

Following the enactment of the apportionment act of 1842, congressional elections were held and in several states, notwithstanding the positive provisions of section 2 of that act, representatives in congress were elected at large. Contests were instituted and the majority of the committee on elections held the second section above quoted to be unconstitutional and void. This view was ably supported in a lengthy report submitted by Hon. Stephen A. Douglas of Illinois: McCrary on Elections (4th ed.), secs. 191, 192. The members of congress elected at large were therefore seated in spite of section 2 of the 1842 act. The report of the committee may be found in 1 Bartlett on Contested Elections, 47-55. This ruling was followed in the later case of Phelps & Cavanaugh, 1 Bartlett on Contested Elections, 248, which arose at the time the first representatives in congress were sent from Minnesota.

So far as we have been able to ascertain, congress has never receded from this position, and we find no case in which members of that body duly elected at large rather than by districts have not been seated. McCrary, in his work on Elections, criticizes the holding of congress in these two cases and points to decisions of this court in Ex Parte Siebold, 100 U. S. 371, and Ex Parte Clark, 100 U. S. 399, as indicating that congress may lawfully require the election of representatives in congress by districts.

In 1850 provision was made for taking the seventh decennial census, and in the census act congress authorized the secretary of the interior to apportion representatives among the several states and fixed the number of members at 233. This act provided for electing one representative at large for each major portion of the ratio. This is the first time that congress

provided for taking the census and determining the apportionment in the same act. The secretary of the interior was not only directed to apportion representatives in congress among the several states, but he was directed to certify the results of his apportionment to the house of representatives and to the governors of the several states (9 Stat. L. 432). The act provided a method for permanently apportioning members of congress after each subsequent decennial census. In this respect it resembles the 1929 act. Congress supplemented this act by 10 Stat. L. 25, giving the secretary of the interior further directions and authority and increasing the membership of the house of representatives to 234.

Following the census of 1860, the number of members of the house of representatives was fixed at 241, and additional members were assigned to certain states. The act is silent as to the matter of congressional districts (12 Stat. L. 353).

Ten years later the number of representatives in the house was fixed at 283, to be elected by districts composed of contiguous territory and containing, as nearly as practicable, an equal number of inhabitants. Provision was also made for electing members at large in states in which an increased number of representatives had been given by law, and providing that the other representatives to which any state might be entitled should be elected by the districts then provided for until the legislature of said state might otherwise provide (17 Stat. L. 28). The act applies only to representatives elected under the apportionment then made.

The act of February 25, 1882 (22 Stat. L. 5) fixes the number of members of the house at 325, apportions them among the states and makes no reference to the ratio of representation. Section 3 of the act provides that members shall be elected by districts composed of contiguous territory and which

contain, as nearly as practicable, an equal number of inhabitants. The provisions of the act are limited to the election of congressmen thereunder. There was also a provision, similar to that contained in the act of 1872, for the election of members at large in case of an increase in the number of representatives of a state.

In 1891 (by 26 Stat. L. 735) the number of representatives was fixed at 356 and apportioned among the several states. The act also provided for election "under this apportionment" by districts composed of contiguous territory containing as nearly as practicable an equal number of inhabitants. Provision was also made for the election of representatives at large in the same manner as that contained in preceding acts.

Following the census of 1900, an apportionment act (31 Stat. L. 733) was passed containing substantially the same provisions both in regard to dividing the states into congressional districts and electing representatives at large "under this apportionment". Section 4, however, is as follows:

> "* * * if the number hereby provided for shall in any state be less than it was before the change hereby made, then the whole number to such state hereby provided for shall be elected at large, unless the legislatures of said states have provided or shall otherwise provide before the time fixed by law for the next election of representatives therein."

Following the census of 1910, by act of congress approved August 8, 1911 (37 Stat. L. 13, c. 5), the number of representatives was fixed at 433, and certain significant changes were made in the language theretofore generally used in such acts. All the prior acts in which reference was made to redistricting, required that the same be done by the legislatures of the several states. At the instance of Congressman Burton

of Ohio, who desired that the referendum provided for by the constitution of that state should be effective so far as redistricting legislation was concerned, section 4 of the 1911 act was made to read as follows:

> "4. That in case of an increase in the number of representatives in any state under this apportionment such additional representative or representatives shall be elected by the state at large and the other representatives by the districts now prescribed by law until such state shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section 3 of this act; and if there be no change in the number of representatives from a state, the representatives thereof shall be elected from the districts now prescribed by law until such state shall be redistricted as herein prescribed."

The effect of this change was to provide that instead of redistricting being done by the legislature, each state was to be "redistricted in the manner provided by the laws thereof."

For the proper construction of this language, see the opinion of this court in the case of State of Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565.

In 1920 a census was duly taken, but the usual apportionment act was not passed. Various attempts were made to enact such legislation, and certain members of congress were outspoken in criticizing that body for its failure to act. For example, see speech of Senator Vandenberg, contained in Congressional Record, vol. 71, part 2, page 1609, et seq. Representatives in congress since 1911 have been elected pursuant to this act of August 8, 1911, notwithstanding the intervening census of 1920.

Repeated and determined efforts were made to remedy this neglect. In making provision for the census of 1930, congress

for the first time since 1850 included the matter of apportionment in the same act that provided for the taking of the census. The 71st congress by an act approved June 18, 1929 (46 Stat. L. 26, c. 28), the same being entitled:

> "An act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress",

not only made provision for taking the census, but also for what might be termed an automatic apportionment of representatives in congress following the 15th decennial census and every census thereafter. The first twenty sections relate to the taking of the census. Section 21 contains a repealing clause.

Section 22 of the act, dealing with the matter of apportionment, reads as follows:

> "Sec. 22 (a). On the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each Fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each state, excluding the Indians not taxed, as ascertained under the fifteenth and each subsequent decennial census of the population, and the number of Representatives to which each state would be entitled under an apportionment of the then existing number of Representatives made in each of the following manners:
>
> (1) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method used in the last preceding apportionment, no State to receive less than one Member;
>
> (2) By apportioning the then existing number of Representatives among the several States according to the

respective numbers of the several States as ascertained under such census, by the method known as the method of major fractions, no State to receive less than one Member; and

(3) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census by the method known as the method of equal proportions, no State to receive less than one Member.

(b) If the Congress to which the statement required by subdivision (a) of this section is transmitted, fails to enact a law apportioning Representatives among the several States, then each State shall be entitled, in the second succeeding Congress and in each Congress thereafter until the taking effect of a reapportionment under this Act or subsequent statute, to the number of Representatives shown in the statement based upon the method used in the last preceding apportionment. It shall be the duty of the Clerk of the last House of Representatives forthwith to send to the Executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the officer who, under section 32 or 33 of the Revised Statutes, is charged with the preparation of the roll of Representatives-elect.

(c) This section shall have no force and effect in respect of the apportionment to be made under any decennial census unless the statement required by subdivision (a) of this section in respect of such census is transmitted to the Congress within the time prescribed in subdivision (a)."

Thus did congress protect itself against the recurrence of a failure to re-apportion representatives in congress following

any census that might be taken in the future. The act does not purport to deprive congress of the right to pass an apportionment act, but it does provide machinery for an apportionment in case congress does not act.

Pursuant to section 22, subd. (a), President Hoover transmitted to the 71st congress, at its regular session on December 4, 1930, a message, set forth in the Record (page 2) giving the number of representatives in congress to which each state was entitled under two different methods of computation. Under either method the State of Minnesota became entitled to nine representatives.

The 71st congress adjourned without passing an apportionment act. Hence, subd. (b) of section 22 of the Act of June 18, 1929, became effective, and pursuant thereto the clerk of the house of representatives transmitted to the Governor of the State of Minnesota a certificate showing that the state was entitled to nine representatives in the 73rd congress and in each congress thereafter until the taking effect of a reapportionment under said act or subsequent statute (page 3).

Attention is directed to the fact that all of the apportionment acts above referred to prior to the 1929 act except the 1850 act (9 Stat. L. 432) deal only with the election of representatives in congress under a particular apportionment. These acts were limited in effect to the election of congressmen held pursuant to the apportionments then provided for.

HISTORY OF CONGRESSIONAL REDISTRICTING BY THE LEGISLATURE OF MINNESOTA.

It is conceded that until 1931 whenever the State of Minnesota was divided into districts for the purpose of congressional elections such action was taken by the legislature in the form of a bill and presented to and approved by the governor. See petitioner's brief, Appendix Q, page 63.

As bearing upon the question of practical construction of our state constitution, we do not consider this prior procedure of importance or controlling. If, under the constitution of the United States and of the State of Minnesota, the governor's approval is not necessary to the validity of a redistricting act, the mere fact that the legislature proceeded by a formal bill for an act could not have the effect of virtually amending the constitution of the United States and of the State of Minnesota.

As illustrative of the carelessness, or perhaps over-caution, with which legislatures sometimes act, the following instances are cited:

(a) When the legislature of Minnesota ratified the seventeenth amendment to the federal constitution, it did so by joint resolution of the legislature presented to the governor and approved by him on June 12, 1912. See General Laws of Minnesota, Special Session of 1912, page 56.

(b) When the eighteenth amendment to the federal constitution was ratified by the legislature of Minnesota, it also did so by joint resolution of the legislature submitted to the governor and approved by him on January 22, 1919. See Session Laws of Minnesota 1919, page 756.

(c) Likewise the legislature of Minnesota in ratifying the nineteenth amendment to the federal constitution proceeded

by joint resolution which was approved by the governor September 11, 1919. See Special Session Laws of Minnesota for 1919, page 105.

It will be conceded that the approval of the governor in the above cited instances added nothing to the force or validity of the action of the Minnesota legislature, and the doctrine of practical construction is not applicable.

POINT I.

The term "legislature" as used in Article I, Section 4, of the Federal Constitution means the bi-cameral body described in Article 4, section 1, of the State Constitution.

The legislature of Minnesota obtains its power to prescribe congressional districts in the State of Minnesota, in the first instance, from Article I, section 4, of the federal constitution, the first paragraph of which reads as follows:

> "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

What did the framers of the constitution mean when they used the term "legislature" in the above connection? Did they mean the legislative body of each state, or did they refer to the entire law-making power of the state?

It is the position of the respondent that this term as it is used in Article I, section 4, in the case of Minnesota at least, signifies the bi-cameral body elected by the people of the state for the purpose of making its laws and consisting of the state senate and house of representatives.

This was the view adopted by the supreme court of Minnesota: State ex rel. Smiley v. Holm, 184 Minn. 228, 238 N. W. 494.

Article 4, section 1, of the constitution of Minnesota provides in part:

> "The legislature shall consist of the senate and house of representatives, which shall meet biennially at the seat of government of the state, at such time as shall be prescribed by law, * * *"

Article 4, section 11 of the state constitution provides as follows:

> "Every bill which shall have passed the senate and house of representatives, in conformity to the rules of each house and the joint rules of the two houses, shall, before it becomes a law, be presented to the governor of the state. If he approves he shall sign and deposit it in the office of the secretary of state for preservation, and notify the house where it originated of the fact. But if not, he shall return it, with his objections, to the house in which it shall have originated; when such objections shall be entered at large on the journal of the same, and the house shall proceed to reconsider the bill. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if it be approved by two-thirds of that house it shall become a law. * * *"

The word "legislature" is used eleven times in the federal constitution and five times in its amendments. In the following instances there can be scarcely any doubt that the word refers to the bi-cameral body holding sessions periodically for the purpose principally of enacting laws for the state:

Article I, section 2, paragraph 1, wherein it is required that electors of members of the house of representatives shall have the qualifications requisite for electors of the most numerous branch of the state legislature;

Article I, section 3, paragraph 1, relating to the election of two senators from each state chosen by the legislature thereof;

Article I, section 3, paragraph 2, wherein the executive of the state is given authority to fill a vacancy in the office of the United States senator in congress during a recess of the legislature until the next meeting of the legislature, which shall then fill such vacancy;

Article 1, section 8, paragraph 17, giving the congress power to exercise legislative authority over all places within the United States purchased by the consent of the legislature of the state in which the same shall be;

Article IV, section 3, paragraph 1, forbidding the formation of a new state by the junction of two or more states or parts of states without the consent of the legislatures of the states concerned;

Article IV, section 4, wherein the United States guarantees to protect every state against domestic violence on application of the legislature, or of the executive when the legislature cannot be convened;

Article V, which deals with the amendments to the constitution, provides that the congress on application of the legislatures of two-thirds of the states shall call a convention for proposing amendments and that the amendments proposed at such convention or proposed by two-thirds of both houses of

congress shall become valid when ratified by the legislatures of three-fourths of the several states;

Article VI, paragraph 3, which requires members of the several state legislatures to be bound by oath or affirmation to support the constitution;

Seventeenth amendment, paragraph 1, which requires that electors of senators shall have the qualifications requisite for electors of the most numerous branch of the state legislatures;

Seventeenth amendment, paragraph 2, which authorizes the legislature of a state to empower the executive thereof to make temporary appointments of senators until the people shall fill the vacancies by election.

The other places in which the word "legislature" is used in the federal constitution are Article I, section 4, and Article II, section 1, paragraph 2.

Article II, section 1, paragraph 2, provides that each state shall appoint in such manner as the legislature thereof may direct a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress. In McPherson v. Blacker, 146 U. S. 1, this court considered the question of whether the legislature of the state of Michigan could provide that presidential electors be elected by districts rather than at large. It was claimed that since the appointment of electors was made by the state, such action could not be by districts and was in violation of Article II, section 1, paragraph 2 of the constitution. This court in the course of its opinion said (page 25):

> "The clause under consideration does not read that the people or the citizens shall appoint, but that 'each state shall'; and if the words 'in such manner as the legislature thereof may direct', had been omitted, it would seem that

> the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of these words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself."

The expression "in such manner as the legislature thereof may direct" was held not to be a limitation on the power of the legislature, but a limitation on the state in respect to any attempt to limit the legislative power of the legislature by constitutional limitations.

Amendment XVII, paragraph 2, undoubtedly employs the expression "legislature" in the same sense as it is used in the first paragraph thereof and undoubtedly has the effect of putting it beyond the power of any state by constitutional limitation, or otherwise, to deprive the legislature of that state of its constitutional right to authorize the executive thereof to fill vacancies in the office of senator in congress.

If we are correct in our deductions, then wherever the term "legislature" is used in the instances above particularly mentioned it refers not to the legislative power of the state as set forth in the constitution of the state, but to the law-making body of each state.

The question then arises whether the framers of the constitution also used the term "legislature" in the same sense in article 1, section 4.

MEANING OF WORD "LEGISLATURE" IN ARTICLE I, SECTION 4.

The petitioner maintains that there is a distinction between the use of the word "legislature" in article I, section 4, and its use in article V and other portions of the constitution, where undeniably the term signifies the bi-cameral legislative body of the state. He claims that this court, in Hawke v. Smith, 253 U. S. 221, so holds. This was an appeal from the judgment of the supreme court of the State of Ohio in an action brought to enjoin the secretary of state of Ohio from spending public money in preparing and printing forms of ballot for submission of a referendum to the electors of that state on the question of ratifying the action of the general assembly in ratifying the amendment to the federal constitution. The supreme court of Ohio affirmed the judgment sustaining a demurrer to the petition. The judgment of the supreme court of Ohio was reversed, this court, in an opinion by Mr. Justice Day saying:

> "The Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the people of the United States. McCulloch v. Maryland, 4 Wheat. 316, 402. The States surrendered to the general government the powers specifically conferred upon the Nation, and the Constitution and the laws of the United States are the supreme law of the land.
>
> "The framers of the Constitution realized that it might in the progress of time and the development of new conditions require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the Fifth Article.
>
> "This article makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the legislatures of two-thirds of the States; thus securing deliberation and consideration before any change can be proposed. The proposed change

can only become effective by the ratification of the legislatures of three-fourths of the States, or by conventions in a like number of States. The method of ratification is left to the choice of Congress. Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people.

"The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the legislatures of three-fourths of the States, or conventions in a like number of States. Dodge v. Woolsey, 18 How. 331, 348. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

"All of the amendments to the Constitution have been submitted with a requirement for legislative ratification; by this method all of them have been adopted.

"The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by 'Legislatures'? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning. Article 1, section 2, prescribes the qualifications of electors of congressmen as those 'requisite for electors of the most numerous branch of the state legislature'. Article 1, section 3, provided that senators shall

be chosen in each State by the legislature thereof, and this was the method of choosing senators until the adoption of the Seventeenth Amendment which made provision for the election of senators by vote of the people, the electors to have the qualifications requisite for electors of the most numerous branch of the state legislature. That Congress and the States understood that this election by the people was entirely distinct from legislative action is shown by the provision of the amendment giving the legislature of any State the power to authorize the Executive to make temporary appointments until the people shall fill the vacancies by election. It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment. In Article IV the United States is required to protect every State against domestic violence upon application of the legislature, or of the Executive when the legislature cannot be convened. Article VI requires the members of the several legislatures to be bound by oath, or affirmation, to support the Constitution of the United States. By Article I, section 8, Congress is given exclusive jurisdiction over all places purchased by the consent of the legislature of the State in which the same shall be. Article IV, section 3, provides that no new States shall be carved out of old States without the consent of the legislatures of the States concerned.

"There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the House of Representatives were required to be chosen by the people of the several States. Article I, section 2.

* * * * * *

"The argument to support the power of the State to require the approval by the people of the State of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the States through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this—ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment.

"At an early day this court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over the adoption of the Eleventh Amendment. Hollingsworth v. Virginia, 3 Dall. 378. In that case it was contended that the amendment had not been proposed in the manner provided in the Constitution as an inspection of the original roll showed that it had never been submitted to the President for his approval in accordance with Article I, section 7, of the Constitution. The Attorney General answered that the case of amendments is a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of the Constitution investing the President with a qualified negative on the acts and resolutions of Congress. In a foot-note to this argument of the Attorney General, Justice Chase said: 'There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition or adoption of amendments to the constitution.' The court by a unanimous judgment held that the amendment was constitutionally adopted.

"It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to

the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented."

We have previously pointed out that the word "legislature" as used in section 2, par. 1, section 3, par. 1, section 3, par. 2, and section 8, par. 17, of Article I, can logically refer only to the legislative body of the state. It seems unbelievable that the framers of the constitution would use a well understood expression such as "legislature" fifteen times in the constitution and its amendments in one sense, and then in article 1, section 4, use it in an entirely different sense. If the framers of the constitution had intended that the law making power of the state, including the power of gubernatorial veto, should be exercised in prescribing the times, places and manner of holding elections for senators and representatives, they would have used the word "state" or some expression such as "law making power of the state", or "by the legislature with the approval of the executive."

This is especially so when it is borne in mind that until the adoption of the seventeenth amendment, the legislatures elected the United States senators. The governor had nothing to do with their selection. Why, then, should he have any voice in regulations for their election? It cannot be claimed that the framers of the constitution intended that the state legislatures were to be free to act (subject to supervision by congress) in prescribing regulations for electing senators, but that in regulating the election of representatives in congress their acts would be subject to the veto power of an executive. If this had been intended, article 1, section 4, would have been drawn in language that expressed such intent. The word "legislature" cannot have two meanings as used in article 1, section 4.

The constitution of Minnesota is peculiar in that it contains specific authorization for the legislature to prescribe the bounds of congressional districts. Unquestionably, the legislature would have had this power without any provision in the state constitution. Article 4, section 23, of the state constitution reads as follows:

> "The legislature shall provide by law for an enumeration of the inhabitants of this state in the year 1865, and every tenth year thereafter. At their first session after each enumeration so made, and also at their first session after each enumeration made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional, senatorial, and representative districts, and to apportion anew the senators and representatives among the several districts according to the provisions of section second of this article."

The supreme court of Minnesota, in State ex rel. Smiley v. Holm, 184 Minn. 228, 238 N. W. 494, said, in speaking of the power to prescribe the bounds of congresional districts:

> "The governor's veto has no relation to such matters, that power pertains, under the state constitution exclusively to state affairs." (Record, p. 53).

It will be noted that in both the federal and state constitutions the term "prescribe" is used. The legislature of the state is not required by either the federal constitution or the constitution of the state to act in any particular manner. It is not even required to "prescribe" by law. We think that the word "prescribe" is here used in its literal sense: to appoint, direct, determine, give direction, or to lay down as a guide, direction or rule of action. The prescribing may be done in any manner the legislature sees fit. The duty imposed upon the legislature in respect to dividing the state into congressional districts is entirely different from its duties in respect to general

state legislation. The two have no relationship. It is not difficult to perceive the logic of the framers of the federal constitution in imposing this important duty upon the representatives of the people in the several state legislatures. When acting in accordance with article I, section 4, of the federal constitution, the legislature is carrying out a federal mandate. It is acting as an agency of the federal government.

Petitioner claims that the general provisions of article 4 of the state constitution, in relation to presenting bills to the governor for his approval, control the specific provisions of article 4, section 23, of the state constitution. Such a contention is contrary to the well established rules of construction. The same rules are applied in relation to the construction of constitutional provisions as in respect to the statutory law. In 12 Corpus Juris, at page 709, it is said:

> "When general and special provisions of a constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control in cases where the special provisions do not apply."

At any rate, the decision of the court below in State ex rel. Smiley v. Holm, supra, is conclusive on this point, so far as the state is concerned.

The judgment of the court of last resort in Minnesota is that when the legislature of the state acts in dividing the state into congressional districts it is not performing a legislative function within the purview of the other provisions of the state constitution which require all bills to be either approved by the governor or passed over his veto before they become laws. The supreme court of Minnesota has said, in effect, that insofar as the state can control the matter, the two bodies of the state legislature are supreme.

Does Article I, section 4, of the federal constitution, require that the action of the legislature in this respect be approved by the governor? The constitution contains no specific provision to this effect, and such a privilege or power on the part of the governor must be read into the section by way of interpretation, so as to delete the word "legislature" and insert in lieu thereof "state" or "lawmaking power of the state".

If the people of Minnesota were to adopt a constitution which provided, among other things, that in dividing the state into congressional districts there must be a vote of three-fourths of the members of the legislature, or that such action must be approved by the supreme court of the state, or that such action would not become effective until the lapse of one year after action by the legislature, could it be seriously contended that such provisions in the state constitution would be effective as against the provisions of article I, section 4?

An interesting case which is directly in point is the election contest of Baldwin v. Trowbridge, reported in 3 Bartlett on Contested Elections, p. 46:

The constitution of Michigan provided that a voter should have resided in the township or ward in which he offers to vote ten days next preceding an election. The legislature of Michigan enacted a law providing that persons in the military service possessing the qualifications provided by the constitution should be allowed to vote wherever they might be, whether within the limits of the state or not. A majority of the committee on elections of the house held this statute to be constitutional insofar as it related to the election of representatives in congress. This decision was based upon the ground that where there is a conflict between the state constitution and the legislative act, in regard to fixing the place of an election for representatives in congress, the power of the legisla-

ture is paramount. This was held to be the necessary effect of article I, section 4, of the constitution of the United States. The language of the majority report is so pertinent to the questions involved in the case at bar that we feel justified in quoting somewhat at length:

> "Here is an unmistakable conflict of authority. The constitution plainly prohibits what the legislature as plainly permits. The one authorizes the election to be held only in the township or ward; the other at military headquarters. The power to act at all in the premises, so far as concerns representatives in Congress, is derived from article one, section four, of the Constitution of the United States, * * *
>
> * * * * * *
>
> "Here the power is conferred upon the legislature. But what is meant by 'the legislature?' Does it mean the legislative power of the State, which would include a convention authorized to prescribe fundamental law; or does it mean the legislature eo nomine, as known in the political history of the country? The committee have adopted the latter construction. At the time the Constitution of the United States was written, there existed in the thirteen states for which it was designed legislatures, created or restrained by some fundamental law, in the shape of charters or constitutions, very much as they exist in the several States now. With this fact before them, is it not probable that the framers of the Constitution, if they intended to confer this power upon State organic conventions, would have chosen some word less liable to misconstruction? It is also apparent, from the manner in which this word is used in other parts of the instrument, that its framers recognized a wide difference between a continuing legislature and a convention temporarily clothed with power to prescribe fundamental law. Article V provides that Congress 'shall call a convention for proposing amendments * * * on application of the legislatures of two-thirds of the several States'. Also, that amendments

shall be valid when ratified by the legislatures of three-fourths of the several States, or by conventions of three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress'. Article VII provides that 'the ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.' The convention closed their labors with the following resolution:

"Resolved, That the preceding constitution be laid before the United States in Congress assembled; and that it is the opinion of this convention that it should afterward be submitted to a convention of delegates chosen in each State by the people thereof, under the recommendation of its legislature."

* * * * *

"But the legislation of Michigan may be sustained as against the constitution of that State, even if the word legislature is to be taken in its most enlarged sense. Whatever power the convention of that State possessed to prescribe the places of holding elections for Representatives in Congress was derived, not like its other powers, from the people, but from the Constitution of the United States, and that, too, because it was a *constructive legislature.* The power conferred is a continuing power. It is not used up when once exercised, but survives the dissolution of the convention. The words of the Constitution are as potent then as before, and if there is any legislative body in the State that can properly be called a *legislature,* they appertain to it as strongly as to any prior legislative body. They do not authorize any convention or legislature to tie the hands of its successors. The people authorize a convention to do that where they (the people) have power; but certainly the people of Michigan had no power to enlarge or restrict the language of the Constitution of the United States."

* * * * *

"Control over the place of voting is lodged in the legislature by the unmistakable language of the Constitution, and cannot, however disguised by names or circumlocution of words, be transferred to another department of government. Now, the constitution of Michigan either fixes the place of holding the election or it does not. If it does not, there is no conflict between the law and the constitution, and the argument is at an end. If it does, then, as before shown, the convention which adopted it entirely exceeded its power, unless such convention is to be considered a *legislature by construction,* and in that event its power, as has also been shown, was just as ample as that of any subsequent legislature, and no more. The power to prescribe the *place,* whether called a qualification, limitation or condition, is still vested in what the constitution calls 'the legislature', and there it must remain. It cannot be divested by giving it another name, however apt it may be."

If Article I, section 4, of the federal constitution is to be construed as requiring gubernatorial approval of the action of the legislature in performing the federal function of prescribing the time, manner and place of election of representatives in congress, it will mean that in Minnesota two-thirds of the members of its legislature must agree thereto if the governor disapproves. If the constitution of Minnesota may require a two-thirds vote, it may by the same reasoning require a four-fifths or a unanimous vote. If the state constitution gives the governor no such veto power, certainly he acquires none from the federal constitution. Is it within the power of the state constitution so to limit the power of the legislature in prescribing for the election of representatives in congress?

As said in Hawke v. Smith, 253 U. S. 221 (227):

"The only question really for determination is: What did the framers of the Constitution mean in requiring rat-

ification by *'Legislatures'?* That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning."

In support of the majority report in *Baldwin v. Trowbridge,* Representative Beaman of Michigan delivered the principal address, to which the special attention of the court is directed. (See Congressional Globe, First Session, 39th Congress, page 815). He said:

"A Representative in Congress, then, is not a State officer. He is not a creature of the State, but of the National Government. The Legislature, in providing the times, places and manner of elections of Representatives, does not derive its authority from the people of the State through their Constitution, but from the Constitution of the United States. This delegation of power is not in terms conveyed through the people of the State, nor the Constitution of the State, but it is conferred directly upon the Legislature. The power is not simply permissive, but mandatory; and it is of the most plenary character, *subject only to the control of Congress* * * * If the act is repugnant to the Constitution of the State as it respects the places of election of State officers * * * then to that extent it is undoubtedly void. If it is framed in pursuance of and in accordance with the Constitution of the United States in regard to the election of Representatives in Congress, then to that extent it is just as clearly valid."

The provisions of the constitution of the state cannot take the power from the legislature of the state to prescribe the times, places and manner of electing representatives in congress, any more than congress can take from a state the right to fix, either

by its constitution or by its laws, the manner of electing state officers.

Control over the matter of voting for representatives in congress is lodged in the legislature by the unmistakable language of the constitution, and cannot by any process of reasoning be transferred to another department of government.

It is true that in prescribing the manner in which congressional elections shall be conducted, the adoption of corrupt practices acts, and regulations for the nomination of candidates by primaries or by conventions, etc., the legislatures of the several states have quite uniformly proceeded by laws regularly enacted in accordance with their several constitutions. This is not strange, but on the other hand was desirable both from considerations of uniformity and economy. Such laws, insofar as they relate to state officers, must necessarily be adopted in this manner. Insofar as they relate to federal officers, the approval of the governor is merely surplusage.

In considering the meaning of the term "legislature" as used in article I, section 4, it is well to bear in mind that very few of the original states comprising the Union gave such power to their chief executives. Much of the irritation and resentment which led to the war of the Revolution was caused by the arbitrary and unpopular acts of the royal governors. The states were rather slow to give to their chief executives a veto power over the acts of their legislatures.

In the thirteen original states, with the exception of Massachusetts, the legislature was supreme in the law-making domain, except that in New York bills were presented for approval to a revision commission consisting of the governor, the chancellor and judges of the supreme court, or any two of them together with the governor. Not until 1821 was the executive

of New York state given a veto power by the constitution of that state. Pennsylvania gave to its executive veto power in 1790, New Hampshire in 1792, Connecticut in 1818, New Jersey in 1844, South Carolina in 1865, Virginia in 1870, Georgia in 1879, Delaware in 1897, Rhode Island in 1909; and North Carolina has never granted its governor the power of veto.

In view of the above, it cannot be said that the framers of the constitution had in mind that the governors of the several states should have any part in the prescribing of the times, places and manner of electing representatives in congress.

South Dakota Case Considered.

Prior to very recent decisions of the highest state courts in Minnesota, Illinois, Missouri and New York, respectively, there appears to have been only one decision directly bearing on the question here involved.

The supreme court of South Dakota in 1910, which was before the enactment of the 1911 reapportionment law, in the case of State ex rel. Schrader v. Polley, 26 S. D. 5, held that a redistricting act passed by the legislature of that state was not valid after a proper petition for a referendum therein was filed until it had been submitted by referendum to the people and approved by them, as required by the constitution of that state. This decision is based squarely upon the ground that a redistricting act of the state legislature is to be treated the same as an ordinary legislative act, and is subject to the same constitutional limitations as to the manner of passage, approval, veto and referendum.

It holds that article I, section 4, of the federal constitution does not confer upon the state legislatures or to the state itself the power to regulate such elections, because that power inheres in the state, and that the federal constitution merely left

that power where it already reposed. It holds that the word "legislature", as used in said section of the constitution, means the law-making body or power of the state and includes the whole law-making machinery of the state as prescribed by its state constitution.

It is interesting to note that the courts of Missouri and New York, respectively, have not followed the reasoning of the South Dakota court.

POWERS OF STATE AS DISTINGUISHED FROM THOSE OF LEGISLATURE.

By way of contrast with those sections of the constitution in which the "legislature" of a state is given authority to act as distinguished from the "state" or the "executive" thereof, it will be noted that a distinction is carefully and invariably made. Territory ceded to the federal government is by the "state" (Article I, section 8, paragraph 17) although in the same paragraph the federal government may exercise authority "over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts," etc. In other words, in ceding territory to the federal government the state acts in its corporate capacity.

In Article V the same may be said of that clause providing [illegible] without its consent, shall be deprived of its equal suffrage in the senate".

In the first paragraph of Article I, section 9, the prohibition against Congress making laws preventing the migration or importation of such persons as any of the states now existing [illegible] prior to the year 1808 undoubtedly [illegible] acting in their full corporate or sovereign

The authority to appoint officers of the militia and train the same is reserved, not to the legislature, but to the states by Article I, section 8, paragraph 16.

The eighteenth amendment provides that "the several states shall have concurrent power" to enforce the amendment by proper legislation. This contemplates the entire law-making power of the states.

In Article V dealing with amendments to the constitution, distinction between the legislature of the state and the state itself is very clear. On application of the legislatures of two-thirds of the states, congress shall call a convention for proposing amendments. Amendments proposed by such a convention, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as either mode of ratification may be proposed by congress, become a part of the constitution.

Whenever the constitution designates a state agency to perform specified federal functions a clear distinction is made between the state, the legislature and the executive of the state.

The matter of elections to the house of representatives in congress was important. Had the framers of the constitution intended that the action of a state legislature under Article I, section 4, should be subject to the approval of the executive of a state, it would seem that the deliberate and wise framers of the constitution would have said so and not have left the matter open to doubt.

It is significant that the only federal officers whom the people had any direct voice in choosing under the constitution as originally framed were their representatives in congress. Senators were elected by the state legislatures. The president and vice president were elected by a body of men appointed in each state "in such manner as the legislature thereof may direct".

As time has gone on, the people of the United States have chafed under their rather indirect participation in federal matters, and the result of this may be seen in the seventeenth amendment.

PRACTICAL CONSTRUCTION.

Much is made of the assertion of the petitioner that the states have quite uniformly for one hundred and forty years prescribed congressional districts by laws enacted as required by their respective constitutions. If the states have proceeded erroneously in this respect at least no one has been injured thereby. No vested rights have been acquired which should cause a court to hesitate to announce now the proper construction of this constitutional provision.

Courts do not give much weight to the doctrine of practical construction in respect to the application or interpretation of constitutions. In State ex rel. University v. Chase, 175 Minn. 259 (273), the supreme court of Minnesota said:

> "Resort cannot then be had to the extraneous to obscure what is already clear, and so start again the process of construction and excuse resort to further extraneous aids. The extraneous or subsequent cannot be resorted to as a means of refuting what is inescapable from the instrument itself in application to its subject. It is not then permissible to adopt any different practical construction of a constitution, however long continued or well established, or however distinguished its authorship. Hence, every authoritative statement of the doctrine of practical construction makes it applicable only in a case of doubtful meaning."

State ex rel. Smiley v. Holm, 184 Minn. 228, 238 N. W. 494 (500);

United States v. Sprague, 282 U. S. 716 (730);

Cooley on Constitutional Limitations, 6th Ed. p. 85,

Louisville & Nashville Railroad v. Kentucky, 161 U. S. 677 (690).

In People v. Tremaine, 252 N. Y. 27 (47), the court said:

"Now comes a serious conflict between the executive and administrative officers and the Legislature by reason of appointments amounting to a substantial encroachment by the latter upon the powers of the former. General acquiescence in a custom which, all things considered, may not have resulted in a harmful violation—or indeed, any violation—of the Constitution, does not preclude a contest when substantial rights are insisted upon. (Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 579). In times of peace and harmony constitutional rights are not asserted. When a crisis presents itself the Constitution is invoked and when a justiciable question is presented to the courts they must decide it."

In the matter of Wendell v. Lavin, 246 N. Y. 116, the court of appeals of New York held unconstitutional a law which had been enacted and acted upon for more than twenty-seven years, saying that the question must be answered irrespective of the action of public authorities for the last quarter of a century and that neither practice nor intentions can modify the express provisions of the constitution.

RECENT DECISIONS.

Aside from the Minnesota case now before the court, the courts of last resort in the states of Missouri, Illinois and New York respectively have rendered decisions which, so far as we are advised, are not yet in print.

THE MISSOURI CASE.

In Missouri, as in New York and Minnesota, the state was redistricted by the legislature without the governor's approval. The supreme court of Missouri in State ex rel. Carroll v. Becker held that sections 3 and 4 of the act of 1911 requiring representatives to be elected by districts prescribed by law were still in full force and effect, and also construed the word "legislature" as used in Article I, section 4 of the federal constitution to contemplate a legislative act adopted in accordance with the constitution of the state. The court took the view that Davis v. Hildebrant, 241 U. S. 565, was decisive on this point.

The Missouri decision is in direct conflict with the decision of the supreme court of Minnesota now under review. However, the Missouri case is not an authority against respondent's contention if this court takes the view that it is for the court of last resort in each state to determine whether or not its legislature has acted in accordance with the constitution of that state in dividing the state into congressional districts.

ILLINOIS CASE.

In Moran et al. v. Bowley, decided by the supreme court of Illinois on January 13, 1932, the court had to deal with an act which was passed by the general assembly and duly approved by the governor. The claim was made, however, that under the terms of this act the population of the various districts were so grossly unequal as to constitute a palpable violation of sections 3 and 4 of the 1911 act which the court held still to be of force and effect notwithstanding the 1929 apportionment act of congress . The supreme court of Illinois did not

agree with the holding of the supreme court of Minnesota that the 1911 act was no longer in effect. Had it so held, undoubtedly the decision would have been different. The court also held that the act constituted a violation of Article II, section 18 of the constitution of Illinois providing that all elections shall be free and equal.

NEW YORK CASE.

The court of appeals of New York In the Matter of the Application of Koenig et al., v. Flynn, decided February 9, 1932, held that a joint resolution of the legislature of that state dividing the state into forty-five congressional districts, which resolution was not submitted to the governor for his approval, is ineffective as an action of the legislature under article I, section 4 of the federal constitution. It held that Article I, section 4 of the federal constitution contemplates that the action of a state legislature should be in the form of a bill to be enacted into law and submitted to the governor in accordance with the provisions of the state constitution. The court also held that sections 3 and 4 of the 1911 act are still in effect.

Both the Missouri and New York decisions refer to Davis v. Hildebrant, supra, as an authority which is determinative. We will discuss this case later on in this brief.

POINT II.

The Act of August 8, 1911 (37 Stat. L. 13, c. 5) Is No Longer in Force.

The 1911 act, like the preceding series of reapportionment acts, with one exception, to-wit, the 1850 law (9 Stat. L. 432) is limited in its scope and application to elections held pursuant to the apportionment made pursuant to the act. This is apparent from a reading of the law.

The title of the act is "An Act For the Apportionment of Representatives in Congress among the Several States under the Thirteenth Census." Section 1 provides for four hundred thirty-three members of the house of representatives, and apportions a certain number to each state.

Section 2 provides for the election of additional representatives in case the territories of Arizona and New Mexico, or either of them, shall become states in the union before the apportionment of representatives under the next decennial census shall have been made.

Unquestionably both sections 1 and 2 are no longer of any force or in effect.

Section 3 provides that in each state entitled *under this apportionment* to more than one representative, the representatives to the sixty-third and each subsequent congress shall be elected by districts composed of a contiguous and compact territory, and containing, as nearly as practicable, an equal number of inhabitants. Said districts shall be equal in number to the number of representatives to which such state may be entitled in congress, no district electing more than one representative. It will be noted that by its express terms section 3 applies to the election of representatives in each state entitled "under this apportionment" to more than one repre-

sentative. This section cannot be construed to apply to representatives elected under any other apportionment. The 1929 act constituted a new apportionment and hence this section of the 1911 act is no longer of force and effect. At the time the 1911 act was passed, undoubtedly congress thought that in accordance with custom dating back to 1790, and pursuant to section 2 of the fourteenth amendment, that following the 1920 census the congress would pass a new apportionment act. No such act was passed, however, until 1929, and hence from 1912 to 1930 congressmen were properly elected in accordance with the apportionment made by the 1911 law.

Section 4 of the 1911 act certainly cannot apply to the elections to be held in 1932. This section reads:

> "That in case of an increase in the number of Representatives in any State *under this apportionment* such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts *now* prescribed by law until such state shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there is no change in the number of representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed."

This became effective August 8, 1911, and hence the districts "*now* prescribed by law" refers to August 8, 1911. Obviously this cannot apply to districts which are prescribed in the various states in 1932. The 1911 act makes no provision as to what shall be done when there is a decrease in the number of representatives and no redistricting has been consummated by the legislature. If the action of the Minnesota legislature as evidenced by H. F. 1456 is ineffective, then in the absence of a

valid redistricting act there is no provision whatsoever for the election of representatives in congress from this state. The legislature of Minnesota is not now in session and its next regular session will be in January, 1933. Whether a special session would be called to meet this emergency is a matter resting wholly within the discretion of the governor. Mason's Minnesota Statutes of 1927, section 24; General Statutes of 1923, section 24.

As bearing upon the question of whether or not the 1911 act, or any portion thereof, is still in effect, let us consider what the situation in Minnesota would be if the 1929 reapportionment act had increased the number of congressmen from this state and the legislature had failed to redistrict the state. If section 4 of the 1911 act is still the law, then in Minnesota the additional representatives would be elected at large and the others by the districts "now prescribed by law". The word "now" must refer to August 8, 1911. See U. S. C. Title II, sec. 4. On that date there were nine congressional districts of this state prescribed by the Laws of Minnesota for 1901, p. 97, ch. 92. By the 1911 apportionment act Minnesota was given ten congressmen, and the legislature promptly enacted Laws 1913, p. 743, ch. 513, creating ten districts. Let us assume that the act of 1929 gave the State of Minnesota eleven congressmen. Applying section 4 of the 1911 act, it would require that ten congressmen be elected from the nine districts, as set forth in Laws of Minnesota 1901, ch. 92, and that one congressman be elected at large. Obviously, this creates an intolerable situation which could not have been contemplated or intended by congress. As we understand it, this is precisely the situation in the State of New York.

The 1911 law is not of a general and permanent character, and plainly affects only the election of congressmen under the apportionment made by that act.

As pointed out by Mr. Justice De Young in his dissenting opinion in the Illinois case, the apportionment act of 1911 was superseded by an act of the seventy-first congress entitled "An Act to provide for the Fifteenth and Subsequent Decennial Censuses and to provide for Apportionment of Representatives in Congress", approved June 18, 1929. Section 21 of this act provides that the act "entitled 'An act to provide for the fourteenth and subsequent decennial censuses,' approved March 3, 1919, and all other laws and parts of laws inconsistent with the provisions of this Act are hereby repealed." Both the title to and the body of the 1911 act disclose in express terms that no apportionment other than the one under the thirteenth census was in the contemplation of congress. The history, nature, purpose and language of the various apportionment acts referred to in an earlier part of this brief disclose an evident intention on the part of congress to have each act replace its predecessor. The provisions of the 1911 act were designed for a special purpose which has been accomplished. Its provisions can have no force or application to an apportionment under the fifteenth census. Section 21 contains an express repeal of inconsistent laws and parts of laws, but aside from this the act of 1911 has expired by its very terms.

Whatever may be said in favor of the desirability of having representatives in congress elected by districts and of having these districts composed of contiguous territory with approximately equal populations, it seems clear to us that we cannot ignore the legal effect of the 1929 act upon the 1911 act.

For reasons with which we are not concerned, congress has chosen to remove by the repealing clause of the act of 1929 the requirement that representatives in congress shall be elected by districts of a certain character and that the legislature shall act in the manner provided by the laws thereof.

Davis v. Hildebrant, 241 U. S. 565.

An analysis of the above case, so strongly relied upon by the petitioners, shows that it falls far short of being decisive of the case at bar.

By an amendment to the constitution of Ohio adopted in 1912 the legislative power of the state is expressly declared to be vested not only in the general assembly of the state, but in the people in whom a right is reserved by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly. In 1915 the general assembly passed an act redistricting the state for congressional purposes. A proper petition for referendum was filed, a vote taken and the law disapproved. Thereupon a suit was brought against the state election officers for the purpose of preventing them from heeding this referendum vote and requiring them to proceed to discharge their duties in the next congressional election upon the assumption that the referendum action was void and that the law passed by the general assembly was valid and final. It was claimed that both the state constitution and Article I, section 4, of the federal constitution were violated in the attempt to make the referendum a part of the legislative authority in respect to the election of members to congress. The supreme court of Ohio held that the referendum was a part of the legislative power of the state, made so by the constitution, and that nothing in the Act of Congress of 1911 or in Article I, section 4, of the federal constitution operated to the contrary. This court affirmed the action of the lower court and, in an opinion written by Mr. Chief Justice White, said (page 567):

> "Without going into the many irrelevant points which are pressed in the argument and the various inapposite authorities cited, although we have considered them all, we think it is apparent that the whole case and every real question in it will be disposed of by looking at it from three points of view—the state power, the power of Con-

gress, and the operation of the provision of the Constitution of the United States referred to.

"1. As to the state power, we pass from its consideration, since it is obvious that the decision below is conclusive on that subject and makes it clear that so far as the state had the power to do it, the referendum constituted a part of the state constitution and laws and was contained within the legislative power and therefore the claim that the law which was disapproved and was no law under the constitution and laws of the State was yet valid and operative, is conclusively established to be wanting in merit.

"2. So far as the subject may be influenced by the power of Congress, that is, to the extent that the will of Congress has been expressed on the subject, we think the case is equally without merit. We say this because we think it is clear that Congress in 1911 in enacting the controlling law concerning the duties of the States through their legislative authority, to deal with the subject of the creation of congressional districts expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law. This is the case since under the act of Congress dealing with apportionment which preceded the act of 1911, by sec. 4 it was commanded that the existing districts in a State should continue in force 'until the legislature of such State in the manner herein prescribed shall redistrict such state,' (act of February 7, 1891, c. 116; 26 Stat. 735), while in the act of 1911 there was substituted a provision that the redistricting should be made by a State 'in the manner provided by the laws thereof.' And the legislative history of this last act leaves no room for doubt that the prior words were stricken out and the new

words inserted for the express purpose, in so far as Congress had power to do it, of excluding the possibility of making the contention as to referendum which is now urged. Cong. Rec., Vol. 47, pp. 3436, 3437, 3507."

Concluding, the court said (page 570):

"It is apparent from these reasons that there must either be a dismissal for want of jurisdiction because there is no power to re-examine the state questions foreclosed by the decision below and because of the want of merit in the Federal questions relied upon, or a judgment of affirmance, it being absolutely indifferent as to the result which of the two be applied."

It will thus be seen that there is nothing in the decision of this court in the above cited case which holds that the redistricting of a state is necessarily subject to the approval of the executive. The holding, as we understand it, is to the effect that where by the laws of a state a referendum is made a part of the legislative power of the state and the court of last resort in that state has held that this is so, and that the action of the legislature in passing a redistricting act is subject to the referendum, that there is nothing either in the federal constitution or in the 1911 act which prevents the operation of the referendum.

But in Minnesota the supreme court has held in State ex rel. Smiley v. Holm, supra, that the governor is not a part of the legislature when it comes to dividing the state into congressional districts. Thus, so far as the state is concerned, in the words of Mr. Chief Justice White, the matter is foreclosed. Unless by the terms of Article I, section 4, the entire legislative power of the state must be called into operation in order to pass a valid redistricting measure, the case of Davis v. Hildebrant is not in point.

If, as we believe, the 1911 act has ceased to have any potency, the same result would follow.

POINT 3.

House File 1456 does not Violate the Act of August 8, 1911 (37 Stat. L. 13, Ch. 5).

The respondent respectfully urges that the question of the validity of the action of the state legislature, as set forth in House File 1456, is for determination under the constitution and laws of the State of Minnesota.

The constitution of the United States gives authority to the legislature of each state to "prescribe" the times, places and manner of holding congressional elections. The federal constitution does not define what shall constitute a state legislature, nor require that it be constituted in any particular or peculiar way. Generally, legislatures are the law-making bodies of the state, directly elected by the people:

Hawke v. Smith, 253 U. S. 221.
Brooks v. Fischer, 79 Cal. 173.
Barlotti v. Lyons, 182 Cal. 575.
Decher v. Secretary of State, 209 Mich. 565.
In re Opinion of the Justices, 118 Maine 544.

We take it as elementary that if the people of Minnesota should provide by appropriate constitutional amendment for the election, or perchance, for the appointment of a single body of men to make the laws without being subject to executive veto, there is nothing in the federal constitution to prevent it. The legislature of a state might conceivably be a small board, commission or committee. The duties of the legislature and executive departments might be commingled, as is now frequently the case in cities operating under what is familiarly called the commission form of government. What constitutes

the legislature of a state is peculiarly a matter for the people of that state. When the question arises as to whether or not the legislature has acted in accordance with the constitution or the laws of a state, the judgment of the highest court of that state is conclusive on the question.

Carstairs v. Cochran, 193 U. S. 10.

Quong Ham Wah Co. v. Industrial Commission, 255 U. S. 445.

Terrace v. Thompson, 263 U. S. 197—affirming 274 Fed. 841.

First Nat'l. Bank of Garnett v. Ayers, 160 U. S. 660.

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61.

Price v. Illinois, 238 U. S. 446.

Montana v. Rice, 204 U. S. 291.

It will be noted from an examination of the petition filed herein in the district court of Minnesota that the petitioner originally objected to the procedure of the state legislature as not being in compliance with the provisions of the state constitution in respect to the enactment of laws. His main objection was to the manner in which House File 1456 was adopted.

The court below held that in districting the state the legislature was acting not strictly in the discharge of legislative duties as a law-making body acting in a sovereign capacity, but more as an agent of the federal government (Record p. 53). More specifically, the court said (p. 53):

> "The legislature in districting the state is not, strictly in the discharge of legislative duties as a lawmaking body, acting in its sovereign capacity—but is acting as representatives of the people of the state under the power granted by said Art. I, sec. 4. It merely gives expression as to district lines in aid of the election of certain federal officials; prescribing one of the essential details serving

primarily the federal government and secondly the people of the state. The legislature is designated as a mere agency to discharge the particular duty. The governor's veto has no relation to such matters; that power pertains, under the state constitution, exclusively to state affairs.

"The word 'legislature' has reference to the well-recognized branch of the state government—created by the state as one of its three branches for a specific purpose—and when the framers of the federal constitution employed this term we believe they made use of it in the ordinary sense with reference to the official body invested with the functions of making laws, the legislative body of the state; and that they did not intend to include the state's chief executive as a part thereof. We would not be justified in construing the term as being used in its enlarged sense as meaning the state, or as meaning the law-making power of the state."

If it is the will of the people of the State of Minnesota, as interpreted by the highest state court, that the governor's approval is not necessary to give potency to such a regulation of the legislature, we can see nothing in the federal constitution to prevent. The question appears to be one for each state to determine for itself. The framers of the federal constitution went only so far as to impose this duty upon the legislatures of the several states. The matter of determining how the legislature of a particular state is to be constituted was left to the people of that state.

If our position is tenable as to this, then it would appear that no federal question is involved, and the situation would be the same as it was in Davis v. Hildebrant, supra, where the court said that there must be either a dismissal for want of a federal question or an affirmance, it being indifferent as to the result which course is pursued.

THE FACT THAT PARTS OF 1911 ACT APPEAR IN UNITED STATES CODE IS OF NO SIGNIFICANCE.

Petitioner attaches great weight to the fact that sections 1, 3, 4 and 5 of the 1911 act are included in the United States Code of 1926 under Title II as sections 2, 3, 4 and 5 respectively, since the code is intended to contain laws of the United States general and permanent in their character in force on December 7, 1925. This is said to make at least sections 3, 4 and 5 of the 1911 act permanent legislation.

We do not understand that the codifiers of the code had authority to change laws or that the adoption of the code had the effect of making laws of the United States permanent which prior thereto had been temporary in character. Mason's U. S. C. 1926, p. 1, provides:

> "* * * but nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this code and the corresponding portion of legislation heretofore enacted, effect shall be given for all purposes whatsoever to such enactments."

It will be noted that the codifiers made certain changes in the language of the 1911 act when it was put into the code. The words "the sixty-third and each subsequent" in section 3 are omitted where it appears in the code as Title II, sec. 3. In Title II, section 4, instead of reading that the other representatives shall be elected "by districts now prescribed by law", the word "now" is omitted, and "on August 8, 1911" is inserted in place thereof. Substantially the same thing is done later in the section providing that where there is no change in the number of representatives from a state, the rep-

resentatives shall be elected from the districts prescribed by law "on August 8, 1911". The 1911 act contains the word "now" in place of "August 8, 1911". These changes are not of any particular importance because in our opinion they merely express the intent of the congress which enacted the 1911 act. If the 1911 act is still in force, in case of an increase in the number of representatives in a state and the failure by the legislature thereof to redistrict, the additional congressmen would be elected at large and the others by the districts as they existed in the state *on August 8, 1911.* The confusion and inconsistency that will arise from such a construction is apparent.

INEQUALITIES IN POPULATIONS OF SEVERAL DISTRICTS INSUFFICIENT TO INVALIDATE ACT.

Still assuming, for the purposes of this argument, that the 1911 act is still in force in so far as it requires that districts shall be composed of contiguous and compact territory and contain as nearly as practicable an equal number of inhabitants, we contend that no sufficient showing has been made which justifies the court in declaring that this mandate of the congress has been violated by the Minnesota legislature, in the instant case.

The court below disposed of this contention of petitioner as follows (Record, page 56):

> "Dividing the territory into districts under Art. I, § 4, involved discretion, a discretion the extent of which cannot be well defined; a discretion on the part of the legislature, not on our part. If the provisions of the 1911 act were still in force, as contended, and serving as a command as to how the duty should be performed, we would be required to hold that the court could interfere only where such discretion is plainly and grossly abused. It

is our function to review questions of law and not to revise official action involving the exercise of discretion. We are not to say whether the division is the best that could have been made, but whether the legislature proceeded according to legal rules. The legislature in this matter was exercising a political and discretionary power granted by the federal constitution for which the members are amenable to their constituents. How nearly equal in population such districts may be made in actual practice must depend largely upon the integrity of the legislature; and we find nothing in the record authorizing our interference even upon the hypothesis that the rule of conduct, as contained in the act of 1911, still prevails. * * * Though a case might arise that would require our disapproval this does not seem to be such."

We respectfully suggest that the holding of the supreme court of Minnesota on this point is entitled to great weight. It makes little, if any, difference to the rest of the citizens of the United States as to how this state is divided into congressional districts. The important thing is that congress has provided that Minnesota shall have nine representatives in the lower house of congress. The times, places and manner of electing these representatives is, by Article I, section 4 of the constitution, imposed upon the legislature of each state. So long as the state of Minnesota is represented by nine congressmen and no more, fairly and honestly elected by the people of the state, we fail to see how either the federal government or the people of other states are concerned.

The division of territory into congressional districts is an administrative function of the legislature and not a judicial function. It is a matter which, in its very nature, requires the exercise of discretion. Such discretion is to be exercised by the body empowered to create these districts and not by the courts. The rule appears to be well established that the

courts will interfere only when such discretion is plainly and grossly abused.

In State ex rel. Meighen v. Weatherill, 125 Minn. 336 (342) the supreme court of Minnesota said:

> "The matter of redistricitng the state into congressional or legislative districts is so essentially administrative or legislative, restrained only by the Constitution, that the courts interfere therein only when there appears a clear and palpable violation of the fundamental law. There is committed to the legislature a wide discretion in the premises the bounds of which cannot be well defined."

Many of the cases involving districting and apportionment acts by state legislatures for state purposes are to be found in the note to Donovan v. Suffolk county, etc., 225 Mass. 55, 2 A. L. R. 1334.

People ex rel. Carter v. Rice, 135 N. Y. 473, was an action to enjoin the secretary of state from acting under an apportionment act of 1892. The constitution of New York vested in the legislature power to alter the senate districts after each census enumeration, and required that this be done so that each senate district should contain, as nearly as may be, an equal number of inhabitants. The court of appeals of New York held that the legislature was possessed of a certain amount of discretion in carrying out this power and that the court had no jurisdiction to review the exercise of such discretion unless it appeared that it had been plainly and grossly abused. The words of Peckham, J., in this connection are forceful (p. 500):

> "We start then with the proposition that to the legislature is intrusted some discretion in the matter of apportionment. Is the court to interfere with such power whenever it thinks that the legislature might in its exercise

possibly have come nearer to an equality, after complying with the specific conditions mentioned in the constitution? This would be to assert a power in the court to supervise the use of the discretion granted to the legislature, if such discretion were exercised in the slightest degree after the constitutional mandate in regard to county lines and county members had been complied with. * * * We think that the courts have no power in such case to review the exercise of a discretion intrusted to the legislature by the constitution, unless it is plainly and grossly abused. * * * The legislative purpose should be to make a district of an equal number of inhabitants as nearly as may be, and how far that may be carried out in actual practice must depend generally upon the integrity of the legislature."

Another leading case is that of People ex rel. Woodyatt v. Thompson, 155 Ill. 451.

This was a suit involving the constitutionality of a state apportionment act. The senatorial ratio was approximately 75,000. The districts outside of Cook county contained from 62,000 to 88,000 inhabitants, and those in Cook county averaged 79,000 inhabitants. The act was sustained. It was held that the courts cannot inquire into the motives which may move the legislature to enact a statute making an apportionment of legislative districts in the manner in which it was made, such motives being presumed to be patriotic. Whether or not the nearest practicable approximation to perfect compactness and equality has been attained is a question for the legislative discretion.

A case frequently referred to in the books and cited as an authority is that of In Re Baird, 142 N. Y. 523. It appeared in this case that the board of supervisors of the County of Kings was required by the constitution to apportion assembly

districts for the election of members of the assembly from that county. The constitution provided that these districts be equal as to population so far as that was reasonably attainable and be composed of convenient and contiguous territory with the towns and counties undivided. There were eighteen assembly districts in the county, and the population of the county divided by eighteen equalled 54,877. Eleven of these districts under the act had populations from 53,000 to 58,000, and the remainder from 48,000 to 61,000. The appeal raised the question of how far the court could interfere with the action of the supervisors in the discharge of ministerial duties involving the exercise of discretion. In the opinion of the court it was said:

"I do not think that the present apportionment is of such a character as to justify the interference of the courts. * * * It was made by the body having the power and discretion under the constitution for that purpose. It adopted no erroneous rule or principle of action as it did in making the first apportionment. * * * The great and principal function of this court is to review questions of law passed upon by inferior courts or arising from the action of ministerial or governmental bodies, and not to revise official action involving the exercise of discretion. If this apportionment does not, upon the face of the record, indicate such a manifest abuse of discretion as virtually to amount to an evasion or disobedience of our former decision, then the court cannot interfere or set it aside without drawing to itself powers which have been confided by the constitution to other departments of the government. * * * There is inequality of population in the districts as formed, but not to such an extent or in such a degree as to warrant us in holding as matter of law that the board has abused its powers or refused to exercise its discretion. * * * The question here is not whether the division is the best that could have been made, but whether the board had jurisdiction and proceeded according to legal rules. If so, the courts cannot require

> them to undo the work on account of errors, mistakes or inequalities resulting from the exercise of their discretionary powers, and to perform it in some other way, without assuming governmental powers with which they have not been intrusted by the constitution or the laws."

Attention is also directed to State ex rel. Warson v. Howell, 92 Wash. 540. The inequalities were admitted by the court to be exceedingly gross. The court said, however, that this fact furnished no ground for declaring the legislative apportionment unconstitutional. While it argued strongly against the failure of the legislature to perform its duty, it stated no ground for setting aside the legislative apportionment valid when enacted. In this case the attack was made upon apportionment which had been made some years prior and which the legislature refused to change notwithstanding the great changes in population which made the districts grossly unequal as to population. It was held that the legislature could not be compelled to redistrict the state as directed by the constitution, and as a corollary thereto that an apportionment act, lawfully enacted, will continue in force until superseded by a subsequent valid act.

We direct the attention of the court to the case of Wise v. Bigger, 79 Va. 269. The general assembly of the state of Virginia divided the state into congressional districts. Various objections to the act were made by one of the sitting congressmen, Mr. Wise. Most of the points made are not material to this controversy, but on the question of inequality of population, on page 281 of the opinion, the court uses this language:

> "It is further alleged by the relator that this said act is unconstitutional and void because the senate had no right to recognize *'pairs'*; and because the bill does not conform to the requirements of Article 5, Sec. 18, of the Con-

stitution of Virginia by making the congressional districts of contiguous counties, cities and towns, compact, and, as nearly as may be, equal in population. Each house of the general assembly is vested with the power of making rules for its own government; and it necessarily has the power to grant members leave of absence, excuse them from voting, when proper, and recognize what are called *pairs. The laying off and defining of the congressional districts is the exercise of a political and discretionary power of the legislature, for which they are amenable to the people, whose representatives they are.*"

All of the above cases deal with state apportionments or districting of some kind. We now refer to the case of Richardson v. McChesney, 128 Ky. 363, 108 S. W. 322, 129 A. S. R. 299, wherein the supreme court of Kentucky ruled that a legislative apportionment of the state into congressional districts cannot be judicially reviewed in the absence of a constitutional provision controlling apportionment. It was pointed out that the constitution of the United States contains no direction to the states on the matter of apportionment into congressional districts and that there was nothing in the state constitution referring to this matter. The suit was brought to have declared invalid acts of 1890 and 1898, respectively, dividing the state of Kentucky into congressional districts. As we understand the case, Kentucky was entitled to eleven congressmen and had a population of 1,648,690, making the exact proportion of population of each district 149,881. In the opinion a table is set forth showing that the eleven districts contained populations ranging from 114,024 to 188,124. In its decision the court said:

"There is no mention of congressional districts in the Constitution of the state; nor is there in that instrument any direction to the General Assembly as to how the dis-

tricts shall be laid off. In the matter of dividing the state into congressional districts the legislature, at least so far as the power and authority of this court extends, is supreme. This court has no control over its action. It would be exceeding the power granted us to undertake to revise or annul a legislative act relating to a subject over which the legislature has absolute control. Except when limited by the Constitution of the State, the General Assembly, especially in administrative and political affairs, is beyond the reach of the judiciary of the state. We have no authority to pass judgment upon its acts. * * * If, in the matter of dividing the state into congressional districts, this court should undertake to declare invalid the apportionment made by the legislative department, it would simply result in setting up our judgment against the judgment of the members elected for the purpose of performing this duty. We would be putting up our opinion against those in whom the exclusive right to regulate this matter has been lodged, and be arrogating to ourselves wisdom, honesty, and fairness superior to those charged by law with the control of these matters. * * * But in the matter of congressional districts we find nothing in our state Constitution to guide us. There is nowhere any limitation upon the power of the legislature, and it would be assuming authority this court does not possess if we undertook to control a co-ordinate department of the government in the performance of a power vested exclusively in it. It is not for the judiciary to question the policy, expediency, or propriety of laws enacted by the General Assembly, unless they conflict with the Constitution. Judge Cooley in his work on Constitutional Limitations, p. 200, thus states with great force and clearness the prevailing doctrine upon this subject: 'The moment a court ventures to substitute its own judgment for that of the Legislature in any case where the Constitution has vested the Legislature with power over the subject, that moment it enters upon a field where it is impossible

to set limits to its authority and where its discretion alone will measure the extent of its interference. The rule of law upon this subject appears to be that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not, in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is an appeal to the justice and patriotism of the representatives of the people. If this fails, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power. Any legislative act which does not encroach upon the power apportioned to the other departments, being prima facie valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the Constitution, and the case shown to come within them."

If the statements made in the debates in congress preceding the adoption of the 1929 census and apportionment act are worthy of belief, there are many truly glaring inequalities in the populations of various congressional districts. For example:

(Congressional Record, Vol. 71, Part 2, page 2277.) Mr. Dowell stated that in Michigan there were some districts containing over 225,000 inhabitants and other districts containing over 400,000 inhabitants. Congressional Record, Vol. 71, Part 3, page 2481, contains a table purporting to show the census figures in the various congressional districts of the state of

Missouri in 1920. Two districts had as low as 138,000 inhabitants, one district contained over 312,000, one over 360,000 and one over 521,000.

(Congressional Record, Vol. 71, Part 3, page 2484.) Mr. Ludlow of Indiana, stated that one member of congress represented 150,000 inhabitants and another represented 1,500,000.

It is our belief that the legislature of Minnesota might lawfully and in full compliance with the provisions of the federal constitution provide for the election of all the congressmen at large on a general ticket. It might divide the state into two, three, or any other number of districts and assign a different number of congressmen to each district. It might make any arrangement, so long as not more than nine congressmen were elected from this state. The election of such congressmen would, of course, be subject to final approval by the house of representatives in congress.

The legislature of this state, after protracted debate and conferences and negotiations in committee and otherwise at the close of its legislative session prescribed the boundaries of nine congressional districts. Assuming that this action of the legislature was not subject to veto by the governor, can it be said that the inequalities in population are so manifest and glaring as to call for judicial interference?

There were many matters to be taken into consideration by the legislature in redistricting the state for congressional purposes, aside from the single element of population. As pointed out in the decisions, unless on the face of the record the redistricting is so grossly unequal that it evinces a reckless and deliberate disregard of fundamental law on the part of the legislature, the administrative act of the legislature will not be interfered with.

Admittedly there are inequalities in the population of the nine congressional districts as delimited by H. F. 1456. If each of the nine districts contained an exactly equal number of inhabitants there would be 283,509 persons in each congressional district. It is manifestly impossible to divide the state with any proper regard for geographical and other considerations so as to bring about such an ideal result.

The redistricting of a state for either legislative or congressional purposes is usually a delicate and difficult matter. The final result is usually arrived at through compromises and concessions. Never is absolute equality attained. While undoubtedly a court could divide the state of Minnesota into nine congressional districts which would be more nearly equal in population, it would involve the exercise of a discretion which is not vested in the judicial branch of the government. Under the federal constitution, it is our earnest contention that whatever discretion there may be is to be exercised by the state legislature without interference by the governor or any other branch of the state government.

REASONS FOR NOT MAKING PROVISION FOR ELECTION OF CONGRESSMEN AT LARGE IN THE 1929 LAW.

The 1929 reapportionment and census act was approved June 18, 1929. Congressmen were not to be elected thereunder until November, 1932, more than three years later. Ample time was given to the legislatures of the several states, where redistricting was required by reason of the reapportionment, to perform this important political duty. The members of congress no doubt felt that three years was long enough to enable all the legislatures to act. They may have assumed

that there was no reasonable possibility of their failing to redistrict and therefore no need of making provision as to what should be done in case of failure to redistrict.

The 1911 act became effective August 8, 1911. Congressmen were to be elected in November, 1912. In many states the legislatures would not be convened in the meantime. This was the case in Minnesota, where the legislature did not meet in regular session until January, 1913. It was reasonably certain that the legislatures of some states unless called in extraordinary session, would not have an opportunity to act. The need of enacting an emergency provision, to take effect in case of failure to redistrict, was apparent. The same need did not exist when the 1929 act was passed.

POINT IV.

THERE IS NO VIOLATION OF THE FOURTEENTH AMENDMENT.

If we understand petitioner's position correctly, he asserts that H. F. 1456 violates the fourteenth amendment to the constitution. He claims that the voters in the districts containing the larger population are in some manner discriminated against or deprived of a right guaranteed by the fourteenth amendment.

The fourteenth amendment, in section 1, deals with privileges and immunities of citizens of the United States, and the right of suffrage is not one of them. This amendment does not add to the privileges and immunities of citizens.

Minor v. Happersett, 21 Wall. 162.

The right of voting is a privilege arising under the constitution of the state and not under the constitution of the United States. If the right belongs to any particular person it is because such person is entitled to it by the laws of the state where he offers to exercise it and not because of the constitution of the United States. In Pope v. Williams, 193 U. S. 621 (632) this court said:

> "The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. * * * It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a State is within the jurisdiction of the state itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution."

In the opinion, Mr. Justice Peckham (page 633) points out that the electors of members of congress must be entitled to vote under the state statute, citing Article I, section 2 of the constitution, and that the question of whether or not conditions prescribed by the state are reasonable or unreasonable is not a federal one. See also

McPherson v. Blacker, 146 U. S. 1 (38),

where the court said:

> "The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been."

Also see

United States v. Anthony, 11 Blatchf. 200;
United States v. Cruikshank, 92 U. S. 542;
United States v. Reese, 92 U. S. 214.

In McPherson v. Blacker, supra, at page 38, the court specifically says:

> "The first section of the Fourteenth Amendment does not refer to the exercise of the elective franchise."

No citizen of Minnesota is deprived of his right to vote by H. F. 1456. No citizen is discriminated against within the meaning of the fourteenth amendment.

Petitioner, on page 30 of his brief, cites a number of authorities in support of his contention that the fourteenth amendment has been violated.

The first case, Nixon v. Herndon, 273 U. S. 536, deals with discrimination against colored persons in the matter of voting. We have no quarrel with this authority. The purpose of the fourteenth amendment was to prevent just such discrimination.

Swafford v. Templeton, 185 U. S. 487, involves an action brought by a white man against certain election officials at a congressional election to recover damages for wrongful refusal to permit the plaintiff to vote. The refusal of the defendants was based upon a statute of Tennessee which the plaintiff attacked as class legislation in violation of the fourteenth amendment. The case was dismissed in the circuit court for want of jurisdiction, and the holding of this court is to the effect that the case was one arising under the constitution of the United States, and that the federal courts had original jurisdiction.

The other four decisions cited on pages 30 and 31 of petitioner's brief are not in point and comment is unnecessary.

House File 1456 is a valid determination by the legislature under the constitution of Minnesota. The petitioner has no right guaranteed to him by the federal constitution or by the federal statutes that actions of a state legislature shall follow any particular procedure. The matter of procedure is for the people of each state. The constitution delegates to the legislature of each state the right to act under Article I, section 4. Whether the legislature shall prescribe the regulations therein referred to by statute, joint resolution, or otherwise, and whether such regulations shall be subject to veto power or to the right of referendum, are left to the determination of the people of each state:

Davis v. Hildebrant, 241 U. S. 565.

The authorities seem to be squarely to the effect that the proceedings of a state legislature in the enactment of a law do not give rise to a federal question. The determination of the state courts that a state law has been validly enacted in accordance with the constitution of that state is final.

Smith v. Jennings, 206 U. S. 276,

Mer. & Manf. Bank v. Pennsylvania, 167 U. S. 461,
Montana v. Rice, 204 U. S. 291,
King v. West Virginia, et al., 216 U. S. 92.

Whether or not the action of a state legislature conflicts with the constitution of the state does not present any question for review by the Supreme Court of the United States.

Vol. V, Hughes, Federal Procedure, sec. 3242.

While the authority to create congressional districts comes from the federal constitution, it is vested in state agencies, to-wit, the legislatures. It is for the courts of each state to say what constitutes the legislature of that state, and whether or not the acts of such legislature are valid under the constitution of that state. Assuming that the federal constitution permits such legislation, it would be for congress to say whether the governor shall be a part of the federal machinery in redistricting the state. Until congress does so act, the question is left to the state legislatures, and it is for the state courts to decide the legal questions here at issue.

CONCLUSION.

To summarize:

1. The term "legislature" as used in Article I, section 4, of the federal constitution does not signify the entire law-making power of the state.

2. As to the State of Minnesota, the term "legislature" as used in the federal constitution means the bi-cameral body described in article 4, section 1, of the state constitution.

3. The reapportionment act of August 8, 1911, is no longer in force.

4. The reapportionment act of 1929 does not require that states be redistricted for congressional purposes in accordance with the laws thereof, or that congressmen be elected by districts of any particular description.

5. House File 1456 is not violative of the 1911 act, even if the same is still in force.

6. House File 1456 does not violate the fourteenth amendment to the federal constitution.

The respondent urges that either the petition should be dismissed or the judgment of the lower court affirmed.

All of which is respectfully submitted.

HENRY N. BENSON,
Attorney General of Minnesota,

WILLIAM H. GURNEE,
Asst. Attorney General of Minnesota,
Counsel for Respondent.